Katz Metals Fabricators, Inc. d/b/a Major Sheet Metals Company, single employers and alter egos *and* Local 810 International Brotherhood of Teamsters, AFL–CIO. Cases 02–CA–095920, 02–CA–102038, and 02–CA–103101

April 15, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon charges and amended charges filed by Local 810 International Brotherhood of Teamsters, AFL–CIO (the Union) on various dates between January 7 and July 16, 2013, the General Counsel issued the consolidated complaint on January 29, 2014, against Katz Metals Fabricators, Inc. d/b/a Major Sheet Metals Company (Respondent Katz and Respondent Major, collectively the Respondent), alleging that the Respondent violated Section 8(a)(5), (3), and (1) of the Act. The Respondent filed an answer to the consolidated complaint on February 10, 2014, admitting in part and denying in part the allegations of the consolidated complaint.

Subsequently, on April 10, 2014, the Respondent and the Union entered into an informal settlement agreement, which was approved by the Regional Director for Region 2 on that day. Among other things, the settlement agreement required the Respondent to: (1) make discriminatee Daniel Soliber whole by paying him specified amounts of backpay and interest; (2) offer reinstatement to Soliber, along with seniority and all other rights or privileges; and (3) post appropriate notices.

The settlement agreement also contained the following provision:

> The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue a complaint that will include the allegations spelled out above in the Scope of Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that all of the allegations of the complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

Pursuant to several letters between the Region and the Respondent, the Region confirmed that the Respondent was refusing to reinstate Soliber, reminded the Respondent that its conduct constituted noncompliance with the settlement agreement, and advised that, if the Respondent did not fully comply with the settlement terms by July 17, 2014, the Regional Director would initiate default proceedings with the Board. The Respondent failed to comply or to provide evidence in support of its defense that it has no available position for Soliber because it no longer operates a business employing individuals who perform installation work.

Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on October 20, 2014, the Regional Director reissued the consolidated complaint. On October 22, 2014, the General Counsel filed a Motion for Default Judgment with the Board. On October 31, 2014, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the Motion for Default Judgment, the Respondent has failed to comply with the terms of the settlement agreement by failing to provide a valid offer of reinstatement to Daniel Soliber. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondent's answer to the original consolidated complaint has been withdrawn, and that all of

the allegations in the consolidated complaint are true.[1] Accordingly, we grant the General Counsel's motion for default judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Katz and Respondent Major have had substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership.

Since about January 2012 and continuing to at least October 20, 2014, Respondent Major was established and/or used by Respondent Katz, as a disguised continuation of Respondent Katz. Respondent Katz established and/or used Respondent Major for the purpose of evading its responsibilities under the Act.

At all material times, Respondent Katz and Respondent Major have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; have had interrelated operations with shared equipment, insurance and office space and have held themselves out to the public as a single-integrated business enterprise.

Respondent Katz and Respondent Major are, and have been at all material times, alter egos and a single employer within the meaning of the Act.

At all material times Respondent Katz and Respondent Major, as corporations, have had an office and place of business located at 434 East 165th Street, Bronx, New York (the Respondents' facility) and have been engaged in the business of manufacturing and installing air condition ducts and ventilators for commercial and residential buildings.

Annually, Respondent Katz and Respondent Major (together, the "Respondent") in the course and conduct of their business operations purchase and receive at their facility goods and materials valued in excess of $50,000 directly from suppliers located outside of the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time mechanics, helpers, apprentices, draftsmen and truck drivers employed by the Employer, excluding all other employees, guards and supervisors as defined in the Act.

At all material times since at least 1998, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by Respondent Katz. This recognition has been embodied in successive collective-bargaining agreements with respect to the terms and conditions of employment of the unit, the most recent of which was effective from August 1, 2012, through July 31, 2015.

At all material times, and at least since around 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act, acting on its behalf:

Isaac Kubersky	Shareholder and Officer
Michael Miranda	Officer
Aubrey Faulkner	Officer
Michael Kubersky	Officer
Andrzej Gaja	Supervisor

[1] See *Dreamclinic, LLC*, 361 NLRB No. 112, slip op. at 2 (2014) (citing *U-Bee, Ltd.*, 315 NLRB 667, 668 (1994)). We note that the informal settlement agreement here includes standard precomplaint noncompliance language even though the informal settlement agreement was actually executed after the General Counsel had issued a complaint and the Respondent had filed an answer. Thus, the agreement states that the Respondent "will have waived its right to file an Answer" rather than stating that a previously filed answer "will be considered withdrawn." Consistent with *Dreamclinic*, which involved similar circumstances, we find the entry of default judgment to be appropriate. Among other provisions in the informal settlement agreement, the parties here agreed that, in the event of the Respondent's noncompliance, the General Counsel "may file a motion for default judgment," "the allegations of the complaint will be deemed admitted," the Respondent "will have waived its right to file an Answer," and the Board may "without necessity of trial or any other proceeding, find all allegations of the complaint to be true" and issue an appropriate order. Through the agreement, the parties objectively manifested assent to the entry of a default-judgment order in the event of the Respondent's noncompliance and to the withdrawal of any previously filed answer. As stated above, it is undisputed that the Respondent is in noncompliance. Because the agreement objectively manifested assent to the entry of a default-judgment order in the event of the Respondent's noncompliance, and the Respondent is undisputedly noncompliant, entry of default judgment is appropriate.

1. In or around December 2012 or January 2013, the Respondent, through Isaac Kubersky, informed employees that, in order to continue their employment, they would have to work as nonunion employees of Respondent Major without the benefits of the union contract.

2. In or around January 2013, the Respondent transferred certain of its employees from Respondent Katz to Respondent Major. The Respondent did so because the employees were members of the Union and covered by the Union contract described above and to discourage employees from engaging in these activities.

3. In or around January 2013, the Respondent laid off employees Daniel Soliber and Luis Flores in order to evade its contractual obligations with the Union. The Respondent did so because the employees were members of the Union and covered by the union contract described above and to discourage employees from engaging in these activities.

4 By the following conduct, the Respondent, without the Union's consent, failed to continue in effect the terms and conditions of employment set forth in the collective-bargaining agreement:

(a). On around April 25, 2012, the Respondent changed the union-security clause (art. 5), the dues-checkoff provisions (art. 6), and provisions related to the Pension Fund and Health and Welfare Fund (art. 18) by hiring employees at Respondent Major to perform work on projects of Respondent Katz and without applying the union contract to those individuals.

(b) In around January 2013, the Respondent changed the seniority provision (art. 13) of the union contract by laying off employees out of seniority order.

(c) In around February 2013, the Respondent changed the grievance and arbitration procedure (arts. 20 and 21) in the Union contract by failing and refusing to respond to the Union's requests to meet on grievances it had filed concerning the layoffs of Daniel Soliber and Luis Flores and other employees.

(d) On around April 12, 2013, the Respondent changed the access provision (art. 19.3) of the union contract by refusing Union Agent Nelson Silva's access to the facility.

(e) The subjects set forth above in subsections (a) through (d) relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

(f) The Respondent engaged in the conduct described in subsections (a) through (d) without the Union's consent.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraph (1), the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraphs (2) and (3), the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. By the conduct described above in paragraph (4), the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by informing employees that, in order to continue their employment, they would have to work as nonunion employees of Respondent Major without the benefits of the union contract, we shall order the Respondent to cease and desist from making such coercive statements.

Additionally, having found that the Respondent has violated Section 8(a)(3) and (1) by laying off employees Daniel Soliber and Luis Flores in order to evade its contractual obligations with the Union and to discourage employees from engaging in union activities, we shall order the Respondent to offer these employees full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. We shall also order the Respondent to make Daniel Soliber and Luis Flores whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful layoffs. The backpay due under this part of our order shall be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent additionally shall be ordered to remove from its files any references to the unlawful layoffs of these employees and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

Having further found that the Respondent has violated Section 8(a)(5) and (1) by refusing to continue in effect all of the terms and conditions of the 2012–2015 agreement by, inter alia, failing to meet and respond to grievances, refusing to permit Union Agent Nelson Silva to access the facility, and changing the union-security clause, dues-checkoff provisions, and provisions related to the Pension Fund and Health & Welfare Fund by hiring employees to perform work on projects of Respondent Katz without applying the union contract to those individuals, and by changing the seniority provision by laying off employees out of seniority, we shall order the Respondent to honor and abide by the terms of the 2012–2015 agreement during its term. We shall also order the Respondent to make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of these unlawful changes, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

We shall also order the Respondent to offer immediate reinstatement to employees who would not have been laid off in or around January 2013 if the contractual seniority provision had been followed or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges. The Respondent is also ordered to make whole those employees for any loss of earnings and other benefits suffered as a result of the Respondent's breach of the contractual seniority provision, in the manner set forth in *F. W. Woolworth Co*., supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondent additionally shall be ordered to remove from its files any references to the unlawful layoffs of these employees and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

In addition, we shall order the Respondent to compensate employees, including Daniel Soliber and Luis Flores, for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Further, we shall order the Respondent to make all contractually-required contributions to fringe benefit funds that it failed to make, if any, including any additional amounts due the funds on behalf of the unit employees in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make any required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, and *Kentucky River Medical Center*, supra.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Katz Metals Fabricators Inc. d/b/a Major Sheet Metals Company, a single employer and alter egos, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that, in order to continue their employment, they would have to work as nonunion employees without the benefits of a union contract.

(b) Laying off employees to evade its contractual obligations with the Union or to otherwise discourage employees from engaging in union activities.

(c) Failing and refusing to bargain collectively and in good faith with Local 810, International Brotherhood of Teamsters, AFL–CIO by failing to continue in effect the terms and conditions of employment set forth in the collective-bargaining agreement, effective August 1, 2012, through July 31, 2015, and covering the following appropriate unit:

> All full time mechanics, helpers, apprentices, draftsmen and truck drivers employed by the Employer, excluding all other employees, guards and supervisors as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount the Respondent otherwise owes the fund.

(a) Honor and comply with the terms of the collective-bargaining agreement, effective August 1, 2012, through July 31, 2015.

(b) Within 14 days from the date of this Order, offer Daniel Soliber and Luis Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Daniel Soliber and Luis Flores whole for any loss of earnings or benefits they may have suffered as a result of their unlawful layoffs in the manner set forth in the remedy section of this decision.

(d) Within 14 days of the date of this Order offer to those employees who would not have been laid off in or around January 2013 had the contractual seniority provision been followed full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, including those of Daniel Soliber and Luis Flores, and within 3 days thereafter, notify the unlawfully laid-off individuals in writing that this has been done and that the layoffs will not be used against them in any way.

(f) Make the unit employees whole for any loss of earnings or other benefits they may have suffered as a result of the Respondent's unlawful failure to comply with the 2012–2015 collective-bargaining agreement, with interest, in the manner set forth in the remedy section of this decision.

(g) Compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(h) Make all contractually-required contributions to fringe benefit funds that it has failed to make since about April 25, 2012, if any, as set forth in the remedy section of this decision.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 2012.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 15, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT inform you that, in order to continue your employment, you would have to work as nonunion employees without the benefits of a union contract.

WE WILL NOT lay you off to evade our contractual obligations with the Union or to otherwise discourage you from engaging in union activities.

WE WILL NOT fail to bargain collectively and in good faith with Local 810, International Brotherhood of Teamsters, AFL–CIO by failing to continue in effect the terms and conditions of employment set forth in the collective-bargaining agreement, effective August 1, 2012, through July 31, 2015, and covering the following appropriate unit:

> All full time mechanics, helpers, apprentices, draftsmen and truck drivers employed by the Employer, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL honor and comply with the terms of the collective-bargaining agreement, effective August 1, 2012, through July 31, 2015.

WE WILL, within 14 days from the date of the Board's order, offer Daniel Soliber and Luis Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Daniel Soliber and Luis Flores whole for any loss of earnings and other benefits resulting from their unlawful layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer to those employees who would not have been laid off in or around January 2013 had the contractual seniority provision been followed full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful layoffs, including those of Daniel Soliber and Luis Flores, and WE WILL, within 3 days thereafter, notify all unlawfully laid-off individuals that this has been done and that the layoffs will not be used against them in any way.

WE WILL make you whole for any loss of earnings or other benefits you may have suffered as a result of our unlawful failure to comply with the 2012–2015 collective-bargaining agreement, with interest.

WE WILL compensate employees for any adverse tax consequences of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters for each employee.

WE WILL make all contractually-required contributions to the fringe benefit funds that we have failed to make since about April 25, 2012.

KATZ METALS FABRICATORS, INC. D/B/A MAJOR SHEET METALS COMPANY

The Board's decision can be found at www.nlrb.gov/case/02-CA-095920 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.